



U.S. Citizenship  
and Immigration  
Services

# Fiscal Year 2019 EB-5 Immigrant Investor Program Modernization

## Small Entity Compliance Guide

### Introduction

The U.S. Department of Homeland Security has prepared this document as the small entity compliance guide required by section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. The guide summarizes and explains rules that DHS adopted, but it is not a substitute for any rule. Only the rule can provide complete and definitive information regarding its requirements.

### Purpose of this Guidance

On July 24, 2019, DHS issued a final rule at [84 FR 35750](#) amending the regulations governing the employment-based fifth preference (EB-5) immigrant investor classification to reflect statutory changes and modernize the EB-5 program. The effective date of the final rule is November 21, 2019. This guidance restates some of the information in the final rule, particularly the information related to small entities. However, this guidance does not replace the final regulations; instead, it is a reference for small entities seeking information concerning the impact of the regulations on them.

### Summary of the Final Rule Provisions

As is detailed fully in the rule, DHS changed specific aspects of the EB-5 program; specifically, the rule increases the required minimum investment amounts, reforms Targeted Employment Area (TEA) designations, provides priority date retention, and clarifies procedures for the removal of conditions. The final rule also includes technical corrections from the proposed rule for future inflation-based adjustments to the investment amounts, and modifies the TEA qualification requirements for any city or town with a population of 20,000 or more. The final rule also updates the regulations to reflect miscellaneous statutory changes made since DHS first published the regulation in 1991 and clarifies definitions of key terms for the program. DHS evaluation of these changes suggests that they are not likely to impact small entities. The two provisions that could involve small entities are the following:

- The rule increases the standard minimum investment amount from \$1 million to \$1.8 million; for investors seeking to invest in a new commercial enterprise (NCE) that will be principally doing business in a TEA, the final rule will retain the 50 percent differential and increase the minimum investment amount from \$500,000 to \$900,000.
- The rule eliminates state designations of TEAs and limits the census tracts that can be added to the census tract(s) in which the NCE is principally doing business to those that are “directly adjacent.”<sup>[1]</sup>

## **Entities Subject to the Rule**

As DHS explains in the Final Regulatory Flexibility Analysis accompanying the final rule, EB-5 investments often involve multiple types of business entities and layers of financial and business activity. Investors who invest funds and file Form I-526, Immigrant Petition by Alien Entrepreneur, petitions are individuals who voluntarily apply for immigration benefits on their own behalf and thus do not meet the definition of a small entity. In addition, DHS has no data or information that would facilitate a determination of the small entity status of NCEs and job-creating entities (JCEs) involved with such investment structures and activity.

Small entities that may incur additional indirect costs by this rule are the regional centers (RCs) that pool immigrant investors' funds into associated NCEs that, in turn, undertake job-creating activities directly or, more typically, indirectly through JCEs that receive EB-5 capital from the RC-associated NCEs (most often through loans). As of the drafting of the final rule, there were 851 approved RCs, and 92 percent of Form I-526 petitions for 2014-2016 were filed by individual investors associated with RCs.

Despite significant data constraints, DHS performed a small-entity analysis of RCs. Based on USCIS data pertaining to the business plans for the RCs analyzed, DHS calculated the average administrative fee charged to individual investors (typically \$50,000) under the RC and the number of investors per RC. DHS multiplied these two data points together to yield a revenue component. DHS then evaluated this revenue component against the small-entity size standards for the type of business activity most RCS undertake. The results of the analysis indicate that most (89 percent), RCs would be small entities.

## **Description of the Projected Reporting, Record-keeping, and Other Compliance Requirements of the Regulations, Including an Estimate of the Classes of Small Entities that Are Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record**

While DHS believes the methodology used in the analysis can lead to reasonable assumptions about how many small entities may be RCs, DHS still cannot determine the exact impact of this rule on those small entities. One reason is that DHS is not sure how many, if any, investors will be deterred from the EB-5 program due to the increased investment amounts and the new TEA requirements. DHS cannot estimate the full potential impact of this rule on RC revenue.

The final rule does not directly impose any new or additional reporting or recordkeeping requirements on those who file forms associated with EB-5, nor does the rule require any new professional skills for reporting. However, the rule may create some additional time burden costs related to reviewing the proposed provisions. DHS believes each reviewing entity would face a familiarization cost of about \$401. While DHS estimates the costs and assumes that they may affect some small entities, data limitations prevent DHS from determining the extent of the specific impact to the small entities.

## **Resources to Support Compliance Among Small Entities**

While DHS believes that most RCs could be small entities based on administrative fee revenue alone, and that the main provisions finalized could impact these small entities, the rule does not impose any compliance requirements directly on these entities. Resources for small entities are available at <https://www.uscis.gov/legal-resources/small-business-regulatory-enforcement-fairness-act-sbrefa>. USCIS can help small entities with questions about the final rule. Please refer to the above website for information on directing questions to the help desk via phone and other inquiries and resources.

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The final rule makes a change from the Notice of Proposed Rulemaking (NPRM) concomitant to the final rule, replacing “contiguous” with “directly adjacent.”